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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 958

EDDIE CAMPBELL, JR., *Petitioner*

v.

STATE OF SOUTH CAROLINA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Petitioner seeks a writ of certiorari to review the judgment of the Supreme Court of South Carolina, S. C. , 96 S.E. 2d 476, entered on January 15, 1957, affirming a judgment of the Court of General Sessions for Chesterfield County, South Carolina, convicting him of perjury. (App. B). Petition for rehearing was denied February 1, 1957. (App. C).

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Whether petitioner was deprived of liberty without due process of law as guaranteed by the Fourteenth Amendment where the verdict of the jury convicting him of perjury was necessarily based on the following evidence: (1) a statement signed by petitioner at a closed fire marshal inquest where petitioner was not represented by nor entitled to counsel; (2) the testimony of the state and federal agents as to what was said and done when said statement was taken; and (3) the testimony of petitioner as a witness repudiating the said statement at the prior arson trial of his father-in-law which was given at a time when petitioner was an involuntary witness, was not informed of his privilege against self-incrimination, and was not represented by counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fourteenth Amendment to the Constitution of the United States, Section 1:

* * * *

"No State shall . . . deprive any person of life, liberty, or property, without due process of law * * *"

2. The General Statutes of North Carolina (1950), Volume 2 B, p. 729.

Chapter 69. *Fire protection*

Section 69-3. *Powers of Commissioner in Investigations.* The Insurance Commissioner, or his deputy appointed to conduct such examination, has the powers of a trial justice for the purpose of summoning and compelling the attendance of witnesses to testify in

relation to any matter which is by provisions of this article a subject of inquiry and investigation, and may administer oaths and affirmations to persons appearing as witnesses before them. False swearing in any such matter or proceeding is perjury and shall be punished as such. The Commissioner or his deputy has authority at all times of the day or night, in performance of the duties imposed by the provisions of this article, to enter upon and examine any building or premises where any fire has occurred, and other buildings and premises adjoining or near the same. All investigations held by or under the direction of the Commissioner or his deputy may, in their discretion, be private, and persons other than those required to be present by the provisions of this article may be excluded from the place where the investigation is held, and witnesses may be kept apart from each other and not allowed to communicate with each other until they have been examined.

3. Article 1, Sec. 17 of the Constitution of South Carolina:

> "No person . . . shall be compelled in any criminal case to be a witness against himself." (Cf. construction in *Town Council* v. *Owens*, 61 S.C. 22, 39 S.E. 184 (1901)).

4. Code of Laws of South Carolina (1952), Volume 2, Title 16, *Crimes and Offenses,* Chapter 4. *Offenses Against Public Justice,* pp. 772-773.

Section 16-203. *False swearing before persons authorized to administer oaths.* Whoever shall, willfully and knowingly, swear falsely in taking any oath required by law, administered by any person directed or permitted by law to administer such oath, shall be

guilty of perjury and, on conviction, incur the pains and penalties of that offense.

Section 16-204. *Additional permissible punishment for perjury.* Besides the punishment already to be inflicted by law for so great crimes, the court or judge before whom any person shall be convicted of willful and corrupt perjury or subornation of perjury may order and send such persons to the state penitentiary, there to be kept to hard labor for any term or time not exceeding the term of seven years.

STATEMENT

Petitioner, a 21 year old colored Marine, (Tr. A 154),[1] on September 6, 1954, was at home near Chesterfield, South Carolina, on leave. (Tr. B 1-2). He had returned from Korea and had been hospitalized as a result of his tour. (Tr. A 152). His military record is highly impressive. (Tr. A 153). On September 6th, he was a passenger in a 1951 Ford automobile owned and driven by his father-in-law, Preston Fleming (Tr. A 147), when the car caught fire and burned. (Tr. A 147, 149).

Fleming filed a claim for the fire loss. The insurance company adjuster contacted petitioner on November 4, 1954 (State Ex. 3) who stated that the fire began spontaneously beneath the dashboard of the vehicle. (Tr. A 65-67).

On February 25, 1955, petitioner was at Camp Lejeune, North Carolina, (Tr. A 14) and had been in

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[1] Key to Record references: *Tr. A* refers to transcript of petitioner's perjury trial; *Tr. B* refers to transcript of *State* v. *Fleming*, arson trial of petitioner's father-in-law, admitted in evidence in petitioner's perjury trial as State Ex. 1.

sick bay for bad nerves and high blood pressure. (Tr. B 44; Tr. A 152). On that day he was called to an interrogation by W. G. O'Neal, a Deputy Fire Marshal of the Insurance Department of the State of *North* Carolina, Special Agent Thomas B. Todd of the National Automobile Theft Bureau, and Master Sergeant John Wills, United States Marine Corps, an agent of the Criminal Investigation Division at Camp Lejeune. (Tr. A 16, 17). All the hallmarks of officiality surrounded the proceeding and O'Neal purported to place petitioner under oath although he was not authorized to administer oaths in investigations of this type. (Tr. A 15). Petitioner was neither represented by counsel nor accompanied by any witness. He had never been to a C.I.D. office before and was rather afraid of courts and "not following orders." (Tr. A 153).

As a result of this proceeding petitioner signed a statement (Def. Ex. C) repudiating his earlier statement to the insurance adjuster and stating that his father-in-law deliberately burned the car in order to obtain another car. It denied any complicity of petitioner in the alleged arson and attempted to explain petitioner's earlier statement on the theory that petitioner had been merely trying to help his father-in-law. The statement contained purported comments of other persons to petitioner which were palpably hearsay, and it was shrouded in the usual ritualistic assertions that petitioner was making the statement voluntarily with knowledge of his rights. (Def. Ex. C)

The insurance company did not pay Fleming's claim and he filed suit to recover on his fire policy. Shortly thereafter, in June, 1955, Fleming was indicted for arson. (Tr. B).

On November 4, 1955, petitioner was again called in at Camp Lejeune. Special Agent Todd and Horace McLain, an Assistant to the Insurance Commissioner of the State of South Carolina, questioned petitioner. (Tr. A 93, 100). He was not afforded counsel. There were no witnesses to what took place. Special Agent Todd and McLain testified that petitioner reaffirmed his February statement at Camp Lejeune and stated that he would testify in accordance with the said statement at the arson trial of his father-in-law. (Tr. A 93-95, 99-101). Petitioner denied these statements. (Tr. A 178).

Prior to the date set for the arson trial of Fleming, petitioner spoke to counsel representing Fleming and told him, on the advice of a Marine officer (Tr. A 175), of the statement he had signed in February. (Tr. B 28). He denied the truth of this statement and stated that he would testify contrary to that statement. (Tr. B 28). Counsel informed the county solicitor before trial of this fact. (Tr. B 30; Tr. A 40, 44).

On November 14, 1955, the arson trial of Fleming began. Despite his knowledge that the youth would testify that Fleming had not set fire to the car, the county solicitor nevertheless had him brought to the trial by process and called him as his first and sole witness. (Tr. B 1). The examination was adversary in nature and was directed toward demonstrating the conflicts in the February statement taken at the fire marshal inquest at Camp Lejeune and the courtroom testimony of petitioner. The county solicitor admitted to the trial court that he had been informed of petitioner's repudiation of the February statement. (Tr. B 30). It is clear that this court proceeding was only in-

tended to serve as a basis for securing petitioner's testimony under oath repudiating what was contained in the February statement. Petitioner was not represented by counsel. (Tr. B 1) He was not informed that he could not be compelled to incriminate himself (Tr. B 1) He was not familiar with court proceedings and had never been in court before. (Tr. B 35) He testified in substance that:

(1) Fleming had nothing to do with wilfully burning the car; (Tr. B 1-10)

(2) The February statement signed by petitioner which asserted that Fleming had wilfully burned the car was false. (Tr. B 24, 33)

(3) The car burned accidentally. (Tr. B 1-10)

(4) The February statement resulted from the fact that the agents had told petitioner to say something untrue at Camp Lejeune, had threatened him, and had told petitioner he could be prosecuted if he did not make such a statement; (Tr. B 13, 14, 38)

(5) Petitioner had never read the statement and could not read the statement; (Tr. B 17, 18)

(6) Petitioner had said nothing on November 4 to Special Agent Todd and McLain about the testimony he would give, and did not tell them that his February statement was true or that he would repeat it at the trial of Fleming. (Tr. B 22, 26, 33)

Following petitioner's testimony, *the county solicitor moved for a directed verdict in favor of the defendant Fleming,* and ordered petitioner held for perjury. (Tr. B 49, 50) The State had no other witnesses.

Petitioner was indicted for perjury in violation of Section 16-203 of the Code of Laws of South Carolina (1952) on February 1, 1956. (App. A) The indictment alleged that he wilfully, knowingly and corruptly swore falsely when he testified at the arson trial to the facts recited above. The alleged false statements were incorporated in an omnibus count of the indictment. (App. A)

At the perjury trial dubious evidence (much of which was later stricken) was introduced by Respondent to the effect that the condition of the car indicated that the fire had not started accidentally. (Tr. A 84-91). In addition to the testimony of petitioner (Tr. A 148-150) and Fleming (Tr. A 182) denying the arson, testimony of other witnesses established that the fire could have been caused by a short circuit of the wires under the dashboard. (Tr. A 82-83; 108; 113-114; 116-117; 126-129) In addition, Agent Todd, corroborated by his associates Sergeant Wills and O'Neal denied that petitioner had been threatened, denied that petitioner had been informed he might be prosecuted if he failed to make a statement, stated that petitioner had been informed of his right to remain silent and denied that petitioner was told to to say anything untrue at the time of the February inquest at Camp Lejeune. (Tr. A 23, 33-36, 68-71) Furthermore, Agent Todd testified that petitioner had read the statement before signing it. (Tr. A 93) Todd, corroborated by McLain, also testified that petitioner had affirmed the February statement and expressed his willingness to testify in accordance with it at a second meeting at Camp Lejeune on November 4th. (Tr. A 94, 100, 101)

Petitioner stated that he had testified truthfully at Fleming's arson trial and affirmed his testimony of

the manner in which the February statement had been procured and the happenings at the meeting of November 4th. (Tr. A 148, 155, 156) Again, he recounted his fear of court-martial unless he did what the agents wanted. (Tr. A 164) He specifically denied that he had been informed of his right to remain silent at the time the February statement was taken. (Tr. A 154). He admitted on examination by the State that the February statement was essentially false but insisted he was under duress, frightened, was confused and misled (Tr. A 161-179). Agent Todd tried the same tactics on the older Fleming but they did not work (Tr. A 183-4).

Necessarily there was no corroboration of his testimony, as he was the only person other than his interrogators present at the crucial times.

The jury returned a general verdict of guilty. This verdict necessarily was predicated upon (a) the February statement, (b) the testimony of the agents as to what was said and done when it was taken, and petitioner's testimony at the arson trial of Fleming going to (a) and (b).

Petitioner was sentenced to imprisonment at hard labor for two years, (App. B) and, as this Court may judicially notice, is subject to civil and penal sanctions under the Uniform Code of Military Justice and Marine Corps Regulations.

Thereafter, Preston Fleming's civil suit for his fire loss was tried out in the same courthouse. No defense of incendiarism was interposed and Fleming secured judgment (see records in the office of the Clerk). A fair reading of the record of the perjury trial overwhelmingly indicates that the fire was not of incendiary origin.

HOW THE FEDERAL QUESTION WAS RAISED

Petitioner objected to the admission of the statement prepared at the C.I.D. by the agents in February, (Tr. A 20), the testimony of Master Sergeant Wills concerning the manner in which the February statement was taken, (Tr. A 74), and the admission of petitioner's solo performance at the arson trial of Fleming (Tr. A 13). Petitioner also requested an instruction setting forth his contention that his testimony at the arson trial was compelled. (Tr. A 201; denied, 193-199). In his Motion for New Trial the admission of petitioner's prior testimony was again objected to upon the grounds:

"*That the examination* at the trial of *State* v. *Fleming* as introduced in the record at the trial of *State* v. *Campbell* compelled the witness and defendant to give evidence against himself in violation of State and Federal Constitutions." (Emphasis supplied) (App. D).

The Court below peremptorily dismissed these contentions without citation of authority, S.C. , 96 S.E. (2d) 476, 480. (App. B) Although petitioner emphasized the self-incriminatory aspect of the testimony given at the arson trial and did not explicitly label his assignment of error as deprivation of liberty without due process of law when before the Supreme Court of South Carolina, the basic substantive objection to guilt being predicated upon such evidence was clear and intrinsic. In any event, as four justices of this Court have recently pointed out, "when a person is to be imprisoned as the result of a proceeding in which he was denied his constitutional rights, we should not be anxious to conclude that he

has failed to raise the constitutional question in the correct procedural form." *In re Groban,* 352 U.S. , 1 L. Ed. 2d 376, 385, decided February 25, 1957, dissenting opinion of Mr. Justice Black. Cf. *Aetna Ins. Co.* v. *Kennedy,* 301 U.S. 389, 393; *Hodges* v. *Easton,* 106 U.S. 408, 412.

REASONS FOR GRANTING THE WRIT

Petitioner was deprived of liberty without due process of law when he was convicted of the crime of perjury as a result of the use of a statement obtained at an inquest where he was not represented by nor entitled to counsel, the testimony of the agents concerning what happened at this interrogation, and his own testimony given at a prior trial when he was an involuntary witness, was not represented by counsel, and was not informed that he could not be compelled to incriminate himself.

Petitioner's conviction rests squarely upon his testimony at the trial of Preston Fleming, the February statement alleged to have been made by him at Camp Lejeune, and the testimony of the agents as to what happened at the February and November inquests. A conviction of perjury which rests upon evidence of this type under the facts of this case is "repugnant to that fundamental fairness essential to the very concept of justice," and hence constitutes a deprivation of liberty without due process of law. Cf. *Lisenba* v. *California,* 314 U.S. 219, 236. There was no substantial untainted evidence upon which the jury could have predicated its verdict without regard to the evidence in question, as in *Stein* v. *People of State of New York,* 346 U.S. 156 (1953). No conviction could have occurred without the challenged evidence, and hence reversal is required if the admission of the evidence violated the Fourteenth Amendment. *Ashcraft* v. *Tennessee,* 322 U.S. 143; *Fikes* v.

Alabama, 352 U.S. , 1 L. ed. 2d 246, decided January 14, 1957.

It is imperative that the circumstances giving rise to the evidence in question be examined.

A. The February statement and the testimony of the agents concerning it

Petitioner signed the February statement following an inquest conducted at Camp Lejeune under the aegis of the United States and the State of North Carolina. At the "trial" of Preston Fleming he testified that the statement had been induced by threats, including prosecution, if he did not make such a statement; and denied being informed of his right to remain silent. He was then tried for perjury not only for making a contrary statement subsequently under oath, but for allegedly falsely stating the circumstances under which the first statement was made. To prove its perjury case, Respondent relied on the February statement, the testimony of the state and Federal agents who took the statement, and the sworn testimony of petitioner at the arson trial.

Petitioner was not represented by counsel nor accompanied by any witness at the Camp Lejeune interrogations. Consequently, he had only his uncorroborated testimony with which to meet the united testimony of the state and Federal agents.

Thus, the exact factual situation predicted by four justices of this Court less than three months ago has taken place to the manifest prejudice of an accused. In *In re Groban,* 352 U.S. , 1 L. ed. 2d 376 , decided February 25, 1957, Mr. Justice Black in his dissenting opinion in which he was joined by the Chief Justice, Mr. Justice Douglas, and Mr. Justice

Brennan stated the probable result of investigations of this type conducted when an accused was not represented by counsel:

> "A secret examination such as the deputy proposed to conduct is fraught with dangers of the highest degree to a witness who may be prosecuted on charges related to or resulting from his interrogation... The witness has no effective way to challenge his interrogators' testimony as to what was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of an accused's statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations, his protestations will normally be in vain. This is particularly true when the officer is accompanied by several of his assistants and they all vouch for his story. But when the public, or even the suspect's counsel, is present the hazards to the suspect from the officer's misunderstanding or twisting of his statements or conduct are greatly reduced.
>
> "The presence of legal counsel or any person who is not an executive officer bent on enforcing the law provides still another protection to the witness. Behind closed doors he can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of the interrogators, as a practical matter, he is subject to their uncontrolled will. * * *" (1 L. ed. 2d at pp. 385, 386)

Furthermore, Mr. Justice Black pointed out that a person subject to an inquisition, not represented by counsel, would have no substantial chance of showing that his interrogators used improper means to elicit a statement from him in the face of the testimony of the officers that the statement was voluntary. (1 L. ed. 2d at p. 386)

The vitality of these observations is realistically present in the pages of the instant record. First, the Court below failed seriously to realize the import of the indictment. The opinion analyzes the indictment as one charging perjury in that petitioner testified falsely on the subject of incendiarism vel non, thus making the issue a true and false contest between the February statement of petitioner and his examination at the so-called arson trial, 96 S.E. 2d 476, at 477.

Yet, the indictment charged much more: "that Thomas Todd told him . . . on or about February 25, 1955, at Camp Lejeune . . . to say something that was not true and at the time threatened him . . . and told him . . . that he could be prosecuted with Preston Fleming unless he said what he, Thomas Todd, wanted him . . . to say; that he . . . had never read the aforesaid statement and could not read the said statement; that he did not tell Thomas Todd and Horace McLain, on or about November 4, 1955, that the aforesaid statement was true and that the same would be his testimony at the trial of Preston Fleming; that he . . . did not say anything about what his testimony would be at the trial of Preston Fleming . . ." (App. A)

After the pleader negatives all of the foregoing charges, the indictment charges that "the said Preston Fleming did willfully set fire to his 1951 Ford automobile on September 6, 1954; the statement given by Eddie Campbell, Jr., on February 25, 1955 . . . was true."

Thus, going to the proof in the instant record, while the state never proved the falsity of petitioner's testimony at the arson trial with reference to the cause

of the fire, by intermingling charges as to the alleged falsity of petitioner's testimony concerning the use by his interrogators of "improper means to elicit a statement from him in the face of the testimony of the officers that the statement was voluntary" (1 L. Ed. 2d 386), the conviction by general verdict was secured. Petitioner was defenseless against the testimony of Todd, McLlain and Wills "as to what was said and done at the secret inquisition." (1 L. Ed. 2d 385, 386).

The instant case requires a re-examination of the broad ramifications of the decision in *Groban*. It demonstrates graphically the result of complete adherence to its doctrine. Not only may a suspect be convicted on the basis of a statement given at such inquiry, but if he presumes to contest the voluntariness of any statement given, he may be subjected to trial for perjury with only his uncorroborated word as a defense against the forces of the state. Seen in this light, it is obvious that even the privilege against self-incrimination is clearly an inadequate substitute for the presence of counsel.

The citizen is on the horns of a dilemma. He must attend the investigation. He must give a statement. If the state distorts or falsifies his statement, he may be tried and the statement used against him. If he contests the voluntariness of the statement, he may be tried for perjury. This is quite simply the essence of totalitarianism.

It is not necessary, however, that this Court overrule *Groban* in order to protect the citizen and at the same time permit the state sufficient leeway in its investigatorial efforts. *Groban* was not concerned

with the admission of evidence obtained at a secret inquest. This Court recognized the possibility that abuse might occur and stated that such abuses might be corrected by excluding from subsequent prosecutions evidence improperly obtained. (1 L. ed. 2d, at p. 381) It is submitted that this doctrine properly interpreted would meet the desire of the dissenting justices to protect the citizen as well as the desire of the majority to prevent "investigatory proceedings" from becoming "unduly encumbered". If investigation is freely permitted, but with the limitation that the Due Process Clause bars the use of the statement secured without the benefit of counsel, each salutary goal is achieved. The evidence, or "lead", has been derived from the inquest and if crime is indicated, the state may then proceed before a grand jury. Due process is secured in its best sense in a critical area and the state not thwarted in its fire marshal hearing. Yet, the use of the statement to build conflict between the testimony of the accused and the officers is avoided and the prejudice engendered from the conflict itself is suppressed.

Re-examination of *Groban* requires the conclusion that the statement and the testimony concerning it can not be a basis for depriving petitioner of his liberty. The same conclusion must be reached in assessing the admissibility of the testimony of the agents concerning the November inquiry, since this interrogation was also conducted in secret while the petitioner was not represented.

It is no answer to these contentions to argue that petitioner did not ask for the assistance of counsel. The investigation was conducted by an agent of the State of North Carolina with the concurrence of a

Criminal Investigation Division agent of the Marine Corps. Petitioner was not entitled to counsel under the North Carolina statute (which closely resembles the Ohio statute), General Statutes of North Carolina (1950), Sec. 69-3. Neither was he entitled to counsel under military law. *Romero* v. *Squier,* 133 F. 2d 528 (C.C.A. 9). Hence a request for counsel by the boy would have obviously been a futile gesture.

B. Petitioner's testimony at the trial of Preston Fleming

Petitioner was called by the State to testify when the state solicitor knew that he had no case against the father-in-law in the absence of petitioner's testimony and when he had been informed by counsel for Fleming that petitioner would testify in favor of his father-in-law and contrary to the February statement. (See App. D infra) Under such circumstances in the Federal system it would appear that the court would not constitute a competent tribunal before which perjury could be committed. *United States* v. *Icardi,* 140 F. Supp. 383 (D.C. DC) Petitioner was not represented by counsel and was not warned of his state constitutional privilege against self-incrimination by the court or anyone else. The privilege was clearly available to him in view of the fact that he had been present at the time of the alleged arson and had made contradictory statements concerning the origin of the blaze in the months following the fire.

It is submitted that this testimony cannot be termed voluntary when given under these conditions and that, hence, its admission at petitioner's trial deprived him of liberty without due process of law. The early American cases recognized that the fact of examination before a magistrate, coroner, or grand jury had

a coercive effect, and the courts excluded admissions made by an accused because they were presumed to have arisen from the authority of the examining officer or body. *People* v. *McMahon,* 15 N.Y. 384 (1857); *People* v. *Mondon,* 103 N.Y. 211; 218 (1886); *State* v. *Matthews,* 66 N.C. 106 (1872); *Jackson* v. *State,* 56 Miss. 311, 312 (1879); *State* v. *Clifford,* 86 Iowa 550 (1892). Indeed, the validity of this type of compulsion was recognized by this Court in *Bram* v. *United States,* 168 U.S. 532.

In recent years the decisions have admittedly departed from this principle, primarily seeking evidence of physical coercion, "relay tactics" of questioning, or unlawful inducement in determining the voluntariness of a statement, e.g., *Lyons* v. *Oklahoma,* 322 U.S. 596; *Watts* v. *Indiana,* 338 U.S. 49. However, this Court in this term has again asserted the undeniable fact that a statement may be involuntary where there is no physical coercion or unlawful inducement. *Fikes* v. *Alabama,* 352 U.S. , 1 L. ed. 2d 246, decided January 14, 1957.

In *Fikes* the evidence that the accused was interrogated intermittently for a week in a state prison away from his home, that his father and lawyer were not permitted to visit him, that he was kept in isolation, and that he was not provided a speedy preliminary examination before a magistrate, was determined by this Court to establish as a matter of law that both of his confessions were involuntary, although the accused did not take the stand to contest the voluntariness of the confessions.

See also, *In re Oliver,* 333 U.S. 257; *Leyra* v. *Denno,* 347 U.S. 556. *Fikes* also affirms the proposition that special attention must be given to the mental and

emotional status of a particular accused in assessing voluntariness. (1 L. ed. 2d, at p. 250)

In the present case it is submitted that when petitioner, a young colored Marine, was summoned by officials of the State of South Carolina, brought to the courthouse in his home town, and asked questions concerning the alleged guilt of his father-in-law without any warning that he possessed the right to remain silent, and without any counsel to represent him, the testimony which resulted was not voluntary. Under similar circumstances courts have recognized that testimony of this type can only be regarded as compelled. *State* v. *Byington,* 114 Utah, 388, 200 P 2d 723 (1948); *People* v. *Maloy,* 204 Mich. 524, 170 N.W. 690 (1919); *State* v. *Caperston,* 276 Mo. 314, 207 S.W. 795 (1918); *United States* v. *Bell,* 81 Fed. 830 (C.C., 1897). These courts have noted, as did the dissenting justices in *In re Groban, supra* (at p. 388), that the average witness has little or no idea as to when or how to raise any of his constitutional privileges.

Other courts have held that ordinarily the mere absence of a warning does not require the result that the testimony is compelled, but recognize that in an unusual case the testimony may be involuntary. *United States* v. *Block,* 88 F. 2d 618 (C.C.A. 2), cert. den. 301 U.S. 690.

Petitioner is aware of the prior decisions of this Court in which it has been held that a witness waives his privilege against self-incrimination unless he asserts it and that there is no duty to inform a witness that he possesses the privilege. *Rogers* v. *United States,* 340 U.S. 367; *United States* v. *Monia,* 317 U.S. 424; *United States ex rel. Vajtauer* v. *Commissioner*

of Immigration, 273 U.S. 103; *Powers* v. *United States,* 223 U.S. 303; *Wilson* v. *United States,* 162 U.S. 613. Petitioner does not challenge these principles of law as applied to the facts of those cases. Petitioner's contention is simply this: Although a trial court may not be *required* ordinarily to inform a witness that he may not be compelled to incriminate himself, *if it does not,* and the evidence establishes that the officiality of the interrogation, and the majesty of the tribunal before which he has been summoned, combined with youth, inexperience and total absence of legal advice, compels the witness to speak where he otherwise would have remained silent, then his testimony is involuntary and cannot be used against him without depriving him of liberty as protected by the Fourteenth Amendment. Cf. *Bram* v. *United States,* 168 U.S. 532.

Judged by this standard, petitioner's testimony at the trial of *State* v. *Preston Fleming* clearly was involuntary and hence could not be used as a basis for his conviction of perjury.

Its introduction at the perjury trial was assigned as error in the Court below and by-passed as without merit; the transcript of the examination was objected to at trial at least on other grounds (Tr. A 13); specifically assigned on motion for new trial (App. D); cf. *Hubbard* v. *Rowe,* 192 S.C. 12, 5 S.E. 2d 187 (1939).

The least that may be said about a proceeding of this nature is that the state was morally an aider and abettor in the perjury charged. *State* v. *Caperston, supra.*

CONCLUSION

It has been contended that the evidence upon which petitioner's guilt was predicated was inadmissible and can not serve as the basis of his conviction. It seems clear that the protection guaranteed to petitioner by the Due Process Clause of the Fourteenth Amendment has been violated. The February statement at the fire marshal inquest was wrongfully procured and then wrongfully used in the examination at the arson trial. On both occasions petitioner was denied assistance of counsel and protection against self-incrimination. The procedure thus used by the state to make a perjury case, under the facts, is revolting to the sense of fairness inherent in due process. A conviction of perjury upon this evidence offends against that which is "implicit in the concept of ordered liberty". Cf. *Palko* v. *Connecticut,* 302 U.S. 19. The judgment of the Supreme Court of South Carolina affirming petitioner's conviction for perjury should not be permitted to stand.

For the foregoing reasons, the foregoing petition for writ of certiorari should be granted.

Respectfully submitted,

NICHOLAS J. CHASE
A. KENNETH PYE
1216 Wyatt Building
Washington 5, D. C.
Counsel for Petitioner

APPENDIX A

Indictment for Perjury

STATE OF SOUTH CAROLINA,
COUNTY OF CHESTERFIELD.

At a Court of General Sessions, begun and holden in and for the County of Chesterfield in the State of South Carolina, at Chesterfield Court House, in the County and State aforesaid, on the first Monday of February in the year of our Lord one thousand nine hundred and fifty-six.

The Jurors of and for the County aforesaid, in the State aforesaid, upon their oath, present:

That Eddie Campbell, Jr., on the 14th day of November, 1955, with force and arms, at Chesterfield Court House in the County of Chesterfield and State of South Carolina, did wilfully, unlawfully, knowingly and corruptly swear falsely and commit perjury in that the said Eddie Campbell, Jr., being then and there duly sworn by Special Judge George Kells duly appointed to preside over the Court of General Sessions of Chesterfield County, State aforesaid, and directed and permitted by law to administer such oath, upon a certain trial, wherein the State of South Carolina charged Preston Fleming with wilfully burning an automobile to collect the insurance, did say on his corporal oath, in substance; That on the 6th day of September, 1954, Preston Fleming had nothing to do with wilfully setting fire to his 1951 Ford automobile; that the statement given by him, the said Eddie Campbell, Jr., on February 25, 1955, in Onslow County, North Carolina, to the effect that Preston Fleming did on September 6, 1954, wilfully burn his 1951 Ford automobile was untrue; that the fire that consumed the aforesaid Ford automobile started in the wiring beneath the dashboard and that flames came from under the dashboard at the time; that Thomas Todd told him the said Eddie Campbell, Jr., on or about February 25, 1955, at Camp Lejeune, North Carolina, to say something that was not true and at the time threatened him, the said Eddie Campbell, Jr., and told him, the said Eddie Campbell, Jr., that he could be prose-

cuted with Preston Fleming unless he said what he, Thomas Todd, wanted him, Eddie Campbell, Jr., to say; that he, Eddie Campbell, Jr., had never read the aforesaid statement and could not read the said statement; that he did not tell Thomas Todd and Horace McLain at Camp LeJeune, North Carolina, on or about November 4, 1955, that the aforesaid statement was true and that the same would be his testimony at the trial of Preston Fleming; that he, the said Eddie Campbell, Jr., on November 4, 1955, at Camp LeJeune, North Carolina, did not say anything to Thomas Todd and Horace McLain about what his testimony would be at the trial of Preston Fleming in Chesterfield, South Carolina;

WHEREAS, in truth and in fact, the said Preston Fleming did wilfully set fire to his 1951 Ford automobile on September 6th, 1954; the statement given by Eddie Campbell, Jr., on February 25, 1955, as aforesaid, was true; the fire that consumed the aforesaid Ford automobile did not start in the wiring beneath the said dashboard; Thomas Todd did not, as aforesaid, tell Eddie Campbell, Jr., to say anything that was not true and did not threaten the said Eddie Campbell, Jr., and did not tell the said Eddie Campbell, Jr., that he could be prosecuted with Preston Fleming as aforesaid; Eddie Campbell had read and could read his aforesaid sworn statement; he, the said Eddie Campbell, Jr., did tell Thomas Todd and Horace McLain at the said time and place that his sworn statement was true and the same would be his testimony at the trial of Preston Fleming; he, the said Eddie Campbell, Jr., at the said time and place told the said Thomas Todd and Horace McLain what his testimony would be at the trial of the said Preston Fleming; he, the said Eddie Campbell, Jr., then and there well knowing his said statement to be false, against the form of the Statute in such case made and provided, and against the peace and dignity of the State.

ROBERT L. KILGO
Robert L. Kilgo
Solicitor

APPENDIX B

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE

v.

EDDIE CAMPBELL, JR.

Opinion and Judgment

TAYLOR, A. J.: Appellant was tried and convicted of the charge of perjury at the February, 1956, Term of General Sessions Court for Chesterfield County and sentenced to two year's confinement and appeals.

The indictment charges that Appellant did, on the 14th day of November, 1955, at the Chesterfield County Courthouse, willfully, unlawfully, knowingly, and corruptly swear falsely and commit perjury in the Court of General Sessions for Chesterfield County, in the case of The State vs. Preston Fleming, wherein Fleming was charged with willfully burning an automobile to collect insurance. Previously, Appellant had given a written statement to the effect that he was with Preston Fleming, his father-in-law, in Fleming's 1951 Ford, when he poured either Kerosene or gasoline from a glass jug on the seats and thereafter set fire to the car and destroyed it. Upon call of the case for trial, Appellant repudiated the entire statement and testified to the effect that he was riding with his father-in-law on the occasion in question when the lights suddenly went out. The driver, Fleming, pulled the car to the side of the road and smoke and flames came from under the hood immediately and the car was consumed; that he was not aware of why the car burned but that he saw Fleming do nothing to bring about the destruction of the car as was set forth in the written statement. A directed verdict of "not guilty" was rendered for the defendant, Fleming. Immediately thereafter, Appellant was arrested and charged with having given perjured testimony .

When the case out of which this appeal arises was called for trial, motion was made to quash the indictment upon the ground that it set forth that the written statement given in the Fleming case by Appellant was a *sworn statement* which was incorrect in that the oath was administered by one W. G. O'Neal, Deputy Fire Marshall, Raleigh, North Carolina, and under the statutes of North Carolina a deputy fire marshall is not clothed with the authority to administer oaths. It will be noted that the indictment does not charge Appellant with having committed perjury in his repudiated statement but charges that the perjury occurred in the trial of the case of The State vs. Preston Fleming; the record reveals that the Solicitor's motion to amend the indictment by striking out the word "sworn" was granted.

> "If (a) there be any defect in form in any indictment or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged. After such amendment the trial shall proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended, unless such amendment shall operate as a surprise to the defendant, in which case the defendant shall be entitled, upon demand, to a continuance of the cause." Section 17-410, Code of Laws of South Carolina, 1952.

The granting of the Solicitor's motion to amend the indictment by deleting the word "sworn" with reference to the statement in nowise changed the nature of the offense charged and was entirely permissible. State vs. Rush, 129 S. C. 43, 123 S. E. 765; State vs. Richey, 88 S. C. 239, 70 S. E. 729; State vs. May, 45 S. C. 509, 23 S. E. 513; State vs. McCrae, 222 S. C. 194, 72 S. E. (2d) 453; State vs. Sweat, 221 S. C. 270, 70 S. E. (2d) 234.

Upon the Court ordering the indictment amended by deleting the word "sworn," a line, with pen and ink, was run through the word "sworn," and Appellant contends the word "sworn" was left readable and that Appellant was thereby prejudiced. We are unable to perceive wherein such operated to the prejudice of Appellant. He was charged with having given perjured testimony in a prior trial, and the statement in question was being used as evidence to substantiate the charge. The fact that the State was willing to concede that the written statement was not a "sworn" statement could have in nowise operated to his prejudice.

It is next contended that the Court erred in refusing Appellant's motion for a mistrial when one of the State's witnesses, Todd, testified over objection and after the trial Judge had ruled the proffered testimony incompetent, that upon investigation he had concluded that the fire was the result of incendiarism. The record reveals that upon objection by Appellant's counsel the trial Judge stated: "Yes, you just tell what you found and let the general deductions be made by the jury." Immediately thereafter, Appellant's attorney withdrew his objection and moved for a mistrial. Upon refusal of this motion, counsel then renewed his motion that the testimony be stricken and the Judge ruled such testimony inadmissible. Thereafter, Appellant sought to elicit from one of his witnesses the same type of testimony as had been refused the prosecution prior to recess for lunch. Upon objection by the Solicitor, the proffered testimony was ruled incompetent. Again Appellant attempted to elicit this type of information from another witness, and the trial Judge, upon objection being made by the Solicitor, stated: "We struck out of the record this morning any reference the man gave as to his conclusion about it; so now why should we let this man give his conclusions? So I am going to sustain the objection." Considerable colloquy insued between counsel and the presiding Judge in the presence of the jury, near the end of which the Solicitor stated:

"The Court will take notice I tried to find a way this morning and couldn't find it."

Whereupon counsel for Appellant inquired:

"Has your Honor instructed the jury about disregarding the testimony of Mr. Todd this morning about the running of tests? Or is he planning to do that later?

"The Court: I struck it and if I didn't, I tell you gentlemen any testimony that is ordered stricken from the record you will disabuse your mind of it completely as though it had never been said and not consider it at all. And I will try to tell them again later on."

The record as a whole reveals that the trial Judge was disallowing the testimony complained of and instructing the jury to disregard it and there could have been no misunderstanding thereabout. This question is resolved against Appellant's contention.

Appellant's question No. 5, as stated in his brief, appears as follows:

"Did his Honor, the presiding judge, fail to specifically instruct the jury to disregard the prejudicial testimony as to conclusions by the witness Todd in accordance with the ruling of the Court while the jury was out that the testimony would be stricken? Or, was the defendant entitled to an immediate instruction that the specific testimony was stricken?"

A portion of what was said in disposing of No. 4 is apropos to this question. Not only did the trial Judge order it stricken and disregarded, but at the end of the charge, when the jury had been excused, the Court inquired of counsel if it had overlooked anything in the charge and there was no request for further charge thereabout. State vs. Anderson, 229 S. C. 403, 93 S. E. (2d) 210; West's South Carolina Digest, Criminal Law, Key 867; Section 10-1210, Code of Laws of South Carolina, 1952.

Question No. 6 charges error in that the charge to the jury on the elements required for conviction of perjury should have been prefixed with the words "whether or not." A reading of the charge leaves no question but that it was clear on this point, and there was no request for clarification or further charge thereabout. This contention must be dismissed as being without merit.

Question No. 7 charges that the Court refused to charge Appellant's request No. 3 because of its length. At the conclusion of the Judge's charge, the jury was excused and the following transpired:

"The Court: Can you think of anything I overlooked?

"Mr. Robertson: Does your Honor take the position that my specific requests were covered by the Court's general charge?

"The Court: I think I did. I tried to.

"Mr. Robertson: Yes, sir, I believe the Court is correct in that. Would your Honor please examine Number Ten? I think that you said essentially that, but would you please look at it and see if you think that should be charged?

"The Court: I think that is it because I said that it was where he was here in Court and was under oath and testified during the trial of a case. I believe I covered it.

"Mr. Robertson: Yes, sir, your Honor did charge essentially as in my Number Ten. And the Court rules that the specific requests were covered by the general charge?

"The Court: I think so. Of course, to your Number Three, why you almost got me charging on the encyclopedia there as I know you don't mean it.

"Mr. Solicitor, anything you can think of?

"Solicitor Kilgo: Nothing further."

There is no merit in this contention and it must be dismissed.

Appellant next contends that he was entitled to have requests Nos. 1, 6, 10, 12, 15, and 16 charged, they being correct statements of law not covered in the general charge.

This question was encompassed in the discussion of question No. 7 and must be resolved adversely to Appellant's contention. State vs. Anderson, supra.

Appellant's 9th question as it appears in his brief is:

> "Did the introduction of the Transcript of Record of the trial, the State vs. Fleming (State's exhibit No. one), compel the witness to give evidence against himself in that such Transcript shows that the state's attorney knew before the witness took the stand that he would not testify in accordance with the former statement as indicated on page 30 of said exhibit that the attorney told the witness, now defendant, 'keep on building it up now,' admitted that Thomas B. Todd had told the witness that he could be prosecuted along with Preston Fleming, and thereupon ordered the arrest for perjury?"

This question was neither presented to nor passed upon at the time of trial; however, there is no merit in this exception.

We are of the opinion that all exceptions should be dismissed and It Is So Ordered. Affirmed.

Stukes, C. J., Oxner and Moss, J. J., concur. Legge, J., not participating.

APPENDIX C

Order Denying Rehearing

THE SUPREME COURT OF SOUTH CAROLINA

Columbia, South Carolina

February 1, 1957

C. Kennon Robertson, Esq.
Chesterfield, South Carolina

Dear Mr. Robertson:

I beg to advise that the Court has this day refused your petition for rehearing in The State vs. Campbell in the following order:

"Petition denied.

T. H. Stukes, C. J.
C. A. Taylor, A. J.
G. Dewey Oxner, A. J.
Joseph R. Moss, A. J.

Legge, A. J., not participating."

The remittitur is being sent down today.

Very truly yours,

J. B. Westbrook
Clerk

JBW:ML

cc: Solicitor Robert L. Kilgo
Darlington, South Carolina

APPENDIX D

Motion for New Trial

. . . . . .

"That the examination at the trial of State versus Fleming as introduced in the record at the trial of State versus Campbell compelled the witness and defendant to give evidence against himself in violation of State and Federal constitutions. That the witness was called to the stand and upon being placed on the stand at the trial of State versus Fleming and examined by the Solicitor he was not notified that he could not be compelled to there testify against himself and that he was there compelled to testify and give evidence that was used against him, that the Solicitor stated to the defendant "keep building it up now" and upon the witness leaving the stand ordered his arrest for perjury."

MAY 29 19
JOHN T. FEY, C

Supreme Court of the United States

OCTOBER TERM, 1956

No. 958

EDDIE CAMPBELL, JR., PETITIONER,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. C. CALLISON,
Attorney General of South Carolina,
Wade Hampton Office Bldg.,
Columbia, South Carolina.
JAMES S. VERNER,
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Columbia, South Carolina,
ROBERT L. KILGO,
Darlington, South Carolina,
Counsel for Respondent.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

Supreme Court of the United States

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EDDIE CAMPBELL, JR., PETITIONER,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of South Carolina, in opposition to the Petition for the writ of certiorari asked for by the Petitioner in this matter, begs to submit the following points and authorities:

STATEMENT

We accept the Statement of the Petition as being substantially correct except that it does not show that the Petitioner was given a true copy of the statement he made at Camp Lejeune on the day he made it, February 25, 1955, for which he gave a signed receipt (Transcript B 31); that he kept this without complaining to those to whom he gave it or to any South Carolina official until the day of the Fleming trial on November 14, 1955, when the Solicitor for

the first time was notified by counsel for Fleming, father-in-law of Petitioner, that Petitioner was going to repudiate his former statements (Transcript B 28-30). We call attention of the Court to the fact that Petitioner can read as shown by the fact that he read his statement from the witness stand (Transcript B 31), is a Sergeant in the Marine Corps, and the whole record shows that he is not a poor, weak, ignorant person, as Petitioner's statement would indicate. We, of course, deny the allegation of the Statement that the *Fleming case* was held solely to lay a basis to trap Petitioner into perjury. Its purpose was to convict Fleming for burning his car. If Petitioner perjured himself, that was incidental.

The Petitioner was not denied any Federal or State Constitutional Rights to Counsel at the Preliminary Investigations.

Petitioner's main contention is that he was denied right to counsel during the preliminary investigations. He had counsel at his trial. The Sixth Amendment of the United States Constitution gives the accused in all criminal prosecutions the right to assistance of counsel for his defense. Article 1, Section 18, of the South Carolina Constitution provides that in all criminal prosecutions the accused shall enjoy the right to be heard fully in his defense by himself or counsel or both. These constitutional provisions have been widely stretched beyond the literal meaning of the words to give the accused the benefit of counsel at all stages of the prosecution and the preliminaries leading thereto. But no case that we can find goes so far as to hold that that one who is not accused, who does not demand counsel, and who is merely asked questions about a possible crime, is entitled either to have present his own counsel or have one appointed for him. We think this claim of the

Petitioner is conclusively answered against him by the recent case of *Re Groban*, 352 U. S. . . . ., 1 L. Ed. 376, where the following occurs:

> "A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies. There is no more reason to allow the presence of the counsel before a Fire Marshall trying in the public interest to determine the case of a fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then, his protection is the privilege against self-incrimination. U. S. Const., Amend V; Ohio Const. Art. 1, Sec. 10. See *Adamson v. California*, 332 U. S. 46, 52, 91 L. Ed. 1903, 1909, 67 S. Ct. 1672, 171 A. L. R. 1223. This is a privilege available in investigations as well as in Prosecutions." (Citing cases.)

In the *Groban case*, Groban demanded counsel, which was refused, the hearing was held in private and he was committed to jail for refusal to answer questions. In the case of the Petitioner here, he made no demand for counsel, the February investigation at Camp Lejeune was held with a member of the Criminal Investigation Division of the Marine Corps present (*Fleming case* Transcript, page 14), and Petitioner was immediately given a copy of his statement, all of which makes our case much stronger than the *Groban case*. Petitioner was no dumb clod of human earth. He was a sergeant in the Marine Corps, with four years' experience. He claimed not to be able to read, which is inconceivable in view of his position with the Marines, and which was refuted by his reading his own testimony during the Fleming trial (*Fleming case* Transcript, pages 19-20). He was not an accused nor was the investigation part of any criminal proceeding against him. In view of the above,

he had no right to counsel and cannot seek a reversal on that ground.

The Petitioner was not forced to testify against himself in violation of either State or Federal Constitutions.

In none of his written or oral statements made prior to the trial of the case of *State v. Fleming*, did the Petitioner testify to anything that would incriminate him in the burning of the car. He made no confessions under duress or otherwise. His only claim that he gave the statements under duress is that he feared some loss of military rank or punishment if he did not give such statements. This was denied by those present when the statements were given (Transcript A 23, 33-36, 69-71).

His real claim is that he was forced to take the witness stand in the trial of *State v. Fleming*. We think he did this not only under the compulsion of the State, but with the ulterior motive of helping out his father-in-law by repudiating the statements given. His actions lead to this conclusion. He was called to the witness stand, sworn as a witness, and did repudiate all material parts of his statements.

This put the Solicitor in the same position the United States Attorney found himself in in *United States v. Block*, 80 Fed. (2d), 618, where the Court held that a witness who repudiated a statement in order to help out his defendant brother, could be cross examined by the District Attorney who called him.

It has been held for many years that there is a duty on the part of all citizens to testify about criminal activities when called upon. The following is from *United States v. Bryan*, 339 U. S. 323, 94 L. Ed. 884, 70 S. Ct. 724.

> "On the other hand, persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions

to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned. See *e.g., Blair v. United States,* 250 U. S. 273, 281, 63 L. Ed. 979, 983, 39 S. Ct. 468 (1919); *Blackmer v. United States,* 284 U. S. 421, 438, 76 L. Ed. 375, 383, 52 S. Ct. 252 (1932)."

We have found no case holding that the provisions of the Fifth Amendment to the Constitution of the United States against self-incrimination applies to the protection of a witness to such an extent as to allow him to refuse to take the witness stand when properly called upon, or to exempt him from liability for perjury committed while on the stand. The following is from *Glickstein v. United States,* 222 U. S. 139, 56 L. Ed. 128:

> "Of course, these propositions being true, it is also true that the immunity afforded by the constitutional quaranty relates to the past, and does not endow the person testifying with a license to commit perjury."

Article 1, Section 17, of the South Carolina Constitution contains the same provision against self-incrimination as does the Federal Constitution. We also have a statutory provision very similar to those involved in the *Glickstein case,* this being Section 26-405 of the 1952 Code of Laws of South Carolina, as follows:

> "In the trial of all criminal cases, the defendant shall be allowed to testify if he desires to do so, and not otherwise, as to the facts and circumstances of the case. Testimony given under this section shall not afterwards be used against the defendant in any other

criminal case, except upon an indictment for perjury founded upon that testimony."

We cite this merely to show that both the Federal and State laws recognize the liability of even a defendant being prosecuted for perjury committed by him while acting as a witness.

The facts show proper grounds for conviction of the Petitioner or perjury.

Petitioner was indicted under Section 16-203 of the South Carolina Code, which is as follows:

"Whoever shall, willfully and knowingly, swear falsely in taking any oath required by law, administered by any person directed or permitted by law to administer such oath, shall be guilty of perjury and, on conviction, incur the pains and penalties of that offense."

The common law offense of perjury was changed by this Statute. The old rule as to materiality now no longer applies. *State v. Byrd,* 28 S. C. 18, 4 S. E. 793. Even if it did, the physical facts disclosed by the burned car and its peculiar characteristics, and the evidence of the other witnesses refute Petitioner's testimony, on material facts as to whether or not the car was willfully burned, as admitted in the Petition, Page 8.

The situation here is similar to that in *State v. Crowley,* 226 S. C. 472, 85 S. E. (2d) 714, from which the following is taken:

"Prior to the murder trial at which the perjured testimony was given, appellant was taken into custody by the officers for the purpose of investigation of the murder and made a written, sworn statement of facts which were considered material to the prosecution. Appended to the statement was appellant's signed receipt of a copy of it. Despite several pre-trial conferences with counsel for the prosecution appellant did not

question the facts recited in his former sworn statement until he was placed on the witness stand in the murder trial when he repudiated the statement and claimed that it was obtained from him by duress, the particulars of which duress he purported to give in his testimony which was perjured, according to the great weight of the evidence. The perjuries were established by the testimony of the investigating officers and others, by appellant's sworn statement (and signed receipt of copy of it) and by corroborating circumstances. As said above, the proof of appellant's guilt fully met the requisite quantum in such cases. * * *."

The mere fact that Fleming won a civil case against the insurance company, as claimed in the Petition, does not preclude the bringing of the perjury charges against Petitioner. A former acquittal of even a defendant in a criminal case for some other charge, would not be *res judicata* on the issue of his guilt of perjury committed while testifying at the first trial. *Kuskulis v. United States,* 37 Fed. (2d) 241; *Allen v. United States,* 194 Fed. 664.

The introduction in evidence at Petitioner's perjury trial did not deprive him of any constitutional rights.

When evidence is given by anyone without invoking the privilege against self-incrimination, he cannot afterwards at another trial or proceeding, claim the privilege. *Warde v. United States,* 158 Fed. (2d) 651; *Heller v. United States,* 57 Fed. (2d) 627, Cert. den. 286 U. S. 567. No claim is made by Petitioner that he invoked the Fifth Amendment in any of the preliminary investigations involving the statements. He could not have done so to protect his father-in-law, as his privilege is personal, *Rogers v. United States,* 340 U. S. 367, 95 L. Ed. 344. Having made the statements, without complaint, he could not later complain when they were used against him when he tried to help out Fleming.

CONCLUSION

For the above reasons we do not see any novel, important, or undecided question of law involved here, that meet the requirements of Rule 19 of the Court, governing the issuance of Writs of Certiorari. It is settled (1) that an unaccused person may be questioned in preliminary investigations about crimes, without right to counsel and (2) that witnesses duly summoned must take the stand and testify as a duty of all citizens unless they incriminate themselves about past actions. Such witness has the right to claim the Fifth Amendment, but this gives him no license to commit perjury.

Petitioner has had a full and fair trial by jury of his peers, according to law. He is entitled to no more. If this Court holds that all those interviewed by officers of the law are entitled to counsel, before any accusation are made, or if it holds that the Fifth Amendment allows witnesses to refuse to even take the witness stand for fear of perjuring themselves, it will have turned back the hands of the clock and will have emasculated law enforcement, making of the Fifth Amendment even more of a shelter for wrongdoers than it is now being distorted into by so many.

We respectfully ask the Court to deny the writ.

T. C. CALLISON,
Attorney General of South Carolina,

JAMES S. VERNER,
Assistant Attorney General of South Carolina,

ROBERT L. KILGO,
Solicitor, Fourth Judicial Circuit of South Carolina.